U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 17Jul2002

In the Matter of:	:	
	:	
CURTIS H. HESS,	:	
Claimant,	:	
	:	
v.	:	**Case No.: 2001-BLA-0117**
	:	
N-S CORPORATION/OLD REPUBLIC INSURANCE CO.,	:	
Employer/Carrier, and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Appearances:

Joseph Wolfe, Esq., Wolfe & Farmer, Norton, VA
For Claimant

Joseph W. Bowman, Esq., Street, Street, Street, Scott & Bowman, Grundy, VA
For Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act,[1] 30 U.S.C. § 901, ***et seq.*** (hereafter "the Act") filed by Curtis H. Hess (hereafter "Claimant") on April

[1] The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lunge Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981.

4, 2000. A hearing was held before the undersigned administrative law judge (hereafter "ALJ") on November 27, 2001.[2] For the reasons set forth below, this claim is **DENIED**.

STATEMENT OF THE CASE

On April 4, 2000, Claimant filed this, this third, application for black lung benefits under the Act. (DX 1; ***see also*** Tr. at 10). Claimant first filed for black lung benefits on January 23, 1981. (DX 27-1). This claim was considered abandoned and denied by letter dated March 20, 1981 due to Claimant's failure to actively pursue his claim. (DX 27-19). However, Claimant filed his second claim for benefits on November 23, 1981.[3] (DX 27-2). Ultimately, ALJ Lawrence E. Gray denied this claim, specifically due to Claimant's failure to prove that he suffered from pneumoconiosis or a totally disabling pulmonary or respiratory impairment. (DX 27-60, 27-75, 27-84, 27-97). Judge Gray's initial decision was appealed to the Benefits Review Board (hereafter "BRB"), which remanded the claim with instructions to specifically consider certain evidence Judge Gray previously did not consider. (DX 27-75). On remand, Judge Gray considered the evidence and concluded that it did not change his initial determination and denied the claim, a decision that was affirmed by the BRB by unpublished Decision and Order dated July 29, 1992. (DX 27-84, 27-97). As mentioned above, Claimant filed the instant claim for benefits on April 4, 2000.

The claims examiner notified NS Corporation (hereafter "Employer") on April 5, 2000 that Claimant named it as the putative responsible operator. (DX 13). Employer initially filed a timely response, stating, ***inter alia***, that it was unable to confirm or deny liability based on the limited information provided to it to that point, but later filed a formal response on May 18, 2000, in which it denied liability in all respects. (DX 14, 15). A Notice of Initial Finding was issued by the claims examiner on June 12, 2000, advising Claimant and Employer that the evidence developed to that point indicated that Claimant may be entitled to benefits. (DX 16). Old Republic Insurance Co., Inc. (hereafter "Carrier"), the insurance carrier for Employer, filed a timely statement of contested issues by cover letter dated June 20, 2000. (DX 17; ***see also*** DX 11, 18). After further medical evidence was developed, the District Director issued a letter dated October 4, 2000, in which the parties were notified that Claimant is eligible for benefits in the amount of $731.00 per month, effective October 2000, and informed Employer that payment should begin no later than thirty days after the date of the notice. (DX 23). Carrier contested this

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[2] References to the Director's Exhibits 1 through 29, Claimant's Exhibits 1 through 4, and Employer's Exhibits 1 through 11, all admitted into evidence at the November 27, 2001 hearing before the undersigned, appear as "DX," "CX," and "EX," respectively, followed by the exhibit number and, if necessary, the page number. References to the hearing transcript appear as "Tr." followed by the page number.

[3] DX 27 contains all of the materials related to both of Claimant's previous claims.

determination by letter dated October 9, 2000 and requested that the claim be forwarded to the Office of Administrative Law Judges for a formal hearing. (DX 25).

The instant claim was transferred to this tribunal by Transmittal Memorandum of October 24, 2000 and assigned to the undersigned. (DX 28, 29). By Notice of Hearing and Prehearing Report dated January 26, 2001, the undersigned notified all parties that a hearing on Claimant's claim was scheduled for May 14, 2001 in Abingdon, Virginia. However, on March 22, 2001, the undersigned issued an Order Canceling Hearing and Staying Proceedings in compliance with ***National Mining Association v. Chao***, No. 1:00CV03086 (D.D.C. Feb. 9, 2001). After activity resumed on this claim, the hearing was rescheduled for November 27, 2001 in Abingdon, Virginia. Counsel for the Director previously informed this tribunal, by letter dated March 12, 2001, that no representative for the Director would attend the hearing and, thus, only Claimant and Employer/Carrier were represented at the hearing. Both Claimant and Employer/Carrier had a full and fair opportunity to examine Claimant, the only witness to testify. (Tr. at 3). Upon completion of the hearing, the record was not held open and the record is now closed.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all documentary evidence admitted. Where pertinent, I have made credibility determinations concerning the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

As the instant case involves a refiled claim, the threshold issue is whether or not Claimant can establish a material change in conditions per 20 C.F.R. § 725.309(c)-(d). (DX 28 (Issue number 14)). In addition, the following issues are currently before me:

1. Timeliness of the claim;

2. Length of coal mine employment;

3. Whether Claimant has pneumoconiosis;

4. Whether the pneumoconiosis arose out of coal mine employment;

5. Whether Claimant is totally disabled;

6. Whether the disability is due to pneumoconiosis; and

7. Whether Employer is the properly named responsible operator.

(DX 28). Although listed on the transmittal Form CM-1025, Employer withdrew the issues of "Miner," "Post 1969 Employment," and "Insurance" at the hearing. (Tr. at 6-7). Employer also

indicated that its objection to the application of the Department of Labor's new regulations to this case was still at issue, and acknowledged that a number of other issues listed on the form were listed solely for appellate purposes. (Tr. at 7-8). Also, counsel for Employer explained that while the issues of "Length of Employment" and "Responsible Operator" are listed as contested, Employer did not intend to introduce any new evidence contrary to the previous findings made by Judge Gray in his two previous decisions, although only the first decision, dated February 16, 1988, addressed these issues.[4] (Tr. at 6-7. ***Compare*** DX 27-60 ***with*** DX 27-84). Finally, counsel for Claimant stated that Claimant also raised a constitutional issue regarding the initial claim being marked by the Director as "administratively closed," but acknowledged that this tribunal lacked jurisdiction to address this issue and explained that this issue was raised only to preserve it for future adjudication, if necessary. (Tr. at 8; DX 29).

The list of issues on the Form CM-1025 is hereby amended to delete "Miner," "Post 1969 Employment," and "Insurance" and all constitutional issues are preserved for appeal purposes. **SO ORDERED**.

Background and Employment History

On his claim form, Claimant reported that his date of birth is May 21, 1923, that the highest level of education he completed was the sixth grade, and that he previously filed for black lung benefits but was denied, as discussed above. (DX 1). Claimant further reported that he currently lives with his wife, Ruby Harding, and that he has no children that would qualify as dependents under the Act or regulations. (***See id.***; Tr. at 27). In connection with this current claim, Claimant listed three previous employers for whom he worked within the coal mine industry, but failed to state how long he worked for each. (DX 2). When asked at the hearing how long he worked in the coal industry, Claimant was not sure, providing answers ranging from twenty-seven years to forty years. (Tr. at 17, 22). However, Social Security Earnings Records reveal that Claimant worked over a 36-year period in the coal mining industry, including at least part of every year between 1943 and 1981, with the exception of 1945 and 1946, time which Miner explained he spent serving in the military during World War II.[5] (DX 4; ***see*** Tr. at 12). Further, Judge Gray determined that Claimant successfully established twenty-nine and three quarters years of coal mine employment (based upon inclusion of quarters in which Claimant earned $50 or more) on the same evidence presented in connection with this claim, a finding that I agree with and adopt. (DX 27-60, at 3; Tr. at 22).

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[4] At the previous hearing, which Judge Gray conducted on June 18, 1986, Employer/Carrier, through counsel, stated it intended to present Claimant's Social Security Earnings Records as the only evidence on the responsible operator issue. (DX 27-52, at 9-10).

[5] At the hearing held in connection with Claimant's prior claim, he testified that he "worked on a dairy farm once for about a year and a half," but could not state when this occurred. (DX 27-52, at 16). I note here that the testimony offered in connection with this claim is consistent with Claimant's previous testimony.

The Social Security Earnings Records also revealed that in 1981, Claimant worked for three different employers: Employer (N-S Corporation), E-P Mining Corp., and C & M Mining Inc. (DX 4; ***see also*** Tr. at 23-24). At the hearing, Claimant could not recall precisely which coal mine company he last worked for. (***See*** Tr. at 23-24; ***see also*** DX 27-52, at 23-24). A review of the entire record, however, shows that E-P Mining Corp. employed Claimant from February 15, 1981 to October 30, 1981 for a total of 880 man hours as a roof bolt operator, and that he worked consistently for Employer from September 1979 to January 1981. (DX 27-10, 27-12). Thus, Employer is the appropriately named responsible operator, as Judge Gray found. (DX 27-60).

After returning from the service, Claimant stated that he returned to the coal industry as a coal loader, meaning that it was his responsibility to physically shovel coal into coal cars for subsequent transportation. (Tr. at 15). During the course of a typical day, Claimant testified that he would load about five or six cars. (***Id.***). Claimant also testified that, in addition to loading coal, his work essentially ran the gamut of coal mine work, which included requiring him to occasionally "sho[o]t coal," meaning that he loaded coal into the machines that "shot" the coal into the cars after hand loading became obsolete, "drill coal," act as a "timber setter," "rock dust," and use a jackhammer to cut coal at the face of the mine. (***See id.*** at 16, 18-19). Most of the time, Claimant either worked at the face of the mine or elsewhere inside the mine, and he further testified that a typical day lasted eight hours, although, at times, he would work longer. (***Id.*** at 17, 19; DX 27-52, at 15-16). Claimant retired from the coal mine industry approximately in 1981 and has not worked since that time. (***Id.*** at 23-24; DX 27-52, at 24; DX 4).

Claimant also testified that he smoked in the past, but quit "some considerable time" ago. (***Id.*** at 19, 24; ***see also*** DX 27-52, at 25-26 (detailing Claimant's smoking history)). Claimant stated that he began smoking once he started working at the mines when he was seventeen years old (although he only smoked a few cigarettes at that time). (***Id.*** at 25). However, when asked what year he quit smoking, Claimant was unsure, estimating that it had been four or five years before the hearing, but he did not disagree with the information he provided to the doctors. (Tr. at 25). Based on his information, Claimant ceased smoking sometime in 1998, after his heart surgery. (***Id.*** at 25-26; ***see*** DX 22). Thus, Claimant smoked for approximately fifty-seven years.

At the hearing, Claimant testified that he last worked in the coal mines as a "bolt machine man," and it was only after he left the industry that he began to experience breathing difficulties. (Tr. at 11). Claimant testified that he has used an oxygen tank for the past two to three years, "tak[ing] at least two hour[s] every day" per doctors' instructions, although he occasionally uses it a little longer. (***Id.*** at 14-15). Claimant also carries an inhaler and uses it "frequently" throughout the day to help him "get [his] breath." (***Id.*** at 21). As referred to above, Claimant has a history of heart problems and underwent heart surgery approximately five to six years ago. (***See***, ***e.g.***, DX 7).

Medical Evidence

The following medical evidence is all of the evidence of record submitted after the BRB finally denied Claimant's prior claim by Decision and Order dated July 29, 1992.

X-ray Interpretations. The table below summarizes the x-ray evidence submitted in connection with this duplicate claim for benefits.[6]

Exhibit Number	Date of X-ray	Physician	Qualifications[7]	Interpretation[8]
EX 1	5/29/98	Dr. Philip A. Templeton	BCR, B-reader	1/0, s/p, 6 zones; emphysema
EX 3	5/29/98	Dr. Paul S. Wheeler	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Light film but no evidence of silicosis or CWP;" "Moderate emphysema with hyperinflation lungs blunting CPAs and areas of decreased and distorted lung markings and possible few small blebs. Minimal linear fibrosis in periphery right mid and lower lung compatible with healed inflammatory disease. Focal arteriosclerosis aortic arch."
EX 5	5/29/98	Dr. William W. Scott, Jr.	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Hyperinflation in lungs compatible with emphysema with bullous changes."

[6] "COPD" means Chronic Obstructive Pulmonary Disease; "CWP" means Coal Workers' Pneumoconiosis; "CHF" means "congestive heart failure;" and "BCR" means "Board-certified Radiologist."

[7] When not clear from the record, I have consulted the website of the American Board of Medical Specialties (www.abms.org) for information on board certifications, and the OALJ's web site (www.oalj.dol.gov) for information on NIOSH-approved B-readers, for both of which I take official (administrative/judicial) notice. In particular, I used these sources to obtain information regarding the qualifications and areas of specialization of Drs. Patel, Paranthaman, Rasmussen, Gash, and Dumont.

[8] Several of the doctors offering x-ray interpretations observed evidence of a healed fracture in Claimant's thoracic spine, as well as other various abnormalities. While the interpretation summaries that follow make no reference to these observations, as they are limited to observations specifically addressing respiratory or pulmonary impairments, all observations made by the reviewing physicians have been considered in connection with this claim for benefits.

EX 7	5/29/98	Dr. Jerome F. Wiot	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Severe COPD." Left pleural effusion and infiltrate within left lower lobe.
EX 1	6/8/98	Dr. Templeton	BCR, B-reader	1/0, s/p, 6 zones; emphysema; "bilateral pleural effusions;" "possible infiltrate, edema."
EX 3	6/8/98	Dr. Wheeler	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Minimal left pleural effusion blunting CPA. Moderate COPD with areas of decreased and distorted lung markings and scattered small bullous blebs. Minimal arteriosclerosis aortic arch."
EX 5	6/8/98	Dr. Scott	BCR, B-reader	No abnormalities consistent with pneumoconiosis. "Emphysema with bullous changes. . . . Mild CHF with small pleural effusion."
EX 7	6/8/98	Dr. Wiot	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Severe COPD;" emphysema. Left pleural effusion and infiltrate within left lower lobe.
DX 9	4/19/00	Dr. Subramaniam K. Paranthaman	B-reader	1/1, t/q, 5 zones; pleural thickening consistent with pneumoconiosis; bulla, calcification in small pneumoconiotic opacities; cor pulmonale; emphysema.
DX 10	4/19/00	Dr. Gaziano	B-reader	2/2, t/r, 5 zones; ill defined diaphragm and heart outline.
EX 9	4/19/00	Dr. Wheeler	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "No evidence of silicosis or CWP." "Hyperinflation [of] lungs with decreased upper lung markings compatible with emphysema and minimal linear interstitial fibrosis or edema in CPAs and lower lungs. Minimal arteriosclerosis aortic arch. Minimal pleural effusion or pleural fibrosis blunting right CPA and few tiny linear scars in lateral periphery RUL and left mid lung from healed inflammatory disease."
EX 10	4/19/00	Dr. Wiot	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "Emphysema with bullous changes. Few granulomata periphery upper lungs compatible with healed tuberculosis. Minimal non-specific linear fibrosis [in] lower lungs."

DX 24	9/6/00	Dr. Gregory Fino	B-reader	No abnormalities consistent with pneumoconiosis; "Diffuse, severe interstitial fibrosis in all lung zones."
EX 1	9/6/00	Dr. Templeton	BCR, B-reader	1/1, t/p, 6 zones; "severe" emphysema; "possible [ ] infiltrate or edema;" "large pulmonary arteries;" cor pulmonale.
EX 3	9/6/00	Dr. Wheeler	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "No evidence of silicosis or CWP;" "Moderate COPD with areas of decreased and distorted lung markings and scattered small bullous blebs. Subtle interlobar effusion or fibrosis . . . probably from recent CHF or healed inflammatory disease. Minimal arteriosclerosis aortic arch. Minimal linear interstitial fibrosis or edema in lower lateral portion."
EX 5	9/6/00	Dr. Scott	BCR, B-reader	Film quality 3; No abnormalities consistent with pneumoconiosis; "Emphysema with hyperinflation in lungs and bullous changes. . . . Probable mild CHF with interstitial edema."
EX 7	9/6/00	Dr. Wiot	BCR, B-reader	No abnormalities consistent with pneumoconiosis; "[severe] COPD;" "superimposed congestive heart failure;" Increase in cardiac size.
CX 2	1/19/01	Dr. Manu N. Patel	BCR, B-reader	Pneumoconiosis, 2/2 s/p, 6 zones; "Mild [COPD] with bilateral upper and mid zone bullous changes;" "large pulmonary arteries;" "previous sternotomy."

Pulmonary Function Studies. The results of three recent pulmonary function studies have been submitted in connection with this refiled claim for benefits. (DX 6, 24; CX 4). The studies were performed for Drs. Paranthaman (DX 6), Fino (DX 24), and Donald Lloyd Rasmussen (CX 4), and dated April 19, 2000; September 7, 2000; and January 19, 2001, respectively. All three tests produced qualifying FEV_1 and MVV results under the regulations.[9] 20 C.F.R. § 718.204(b)(2) (2001). In addition, Dr. Paranthaman noted that Claimant suffered from "[v]ery severe airway obstruction" and that Claimant's post-bronchodilator results showed "[s]ignificant improvement." (DX 6).

[9] The tables contained in Appendix B of Title 20, Part 718 of the Code of Federal Regulations only list results for men age seventy-one and younger. At the time of the tests, Claimant was seventy-four (DX 6) and seventy-five years old (DX 24; CX 4) and, thus, standards for his age are not included in the appendix. Claimant's recent test results would qualify by extrapolation, however.

Arterial Blood-Gas Tests. The record also contains the results of three recent arterial blood gas tests, all performed by the same doctors who administered the above-discussed pulmonary function studies and taken on the same dates. (DX 8, 24; CX 3). However, only one test produced results that qualify under the regulations. (***Compare*** CX 3 ***with*** DX 8, 24). Additionally, Drs. Paranthaman and Rasmussen noted that Claimant's readings show evidence of "[m]ild hypoxemia at rest." (DX 8; CX 3). Finally, only Dr. Rasmussen's readings include results recorded after Claimant underwent exercise.

Medical Opinions. The following medical opinions were submitted in connection with this claim:

1. Hospital records from **Holson Valley Medical Center** (hereafter "HVMC"), relating to a hospitalization in May 1998 for open heart surgery, were submitted. These records consist of a pre-admission note by **Dr. Denny Gash** and a discharge summary by **Dr. Herve Dumont**.

a. **Dr. Gash**, who is Board-certified in internal medicine with a subspecialty in cardiovascular disease, initially examined Claimant on May 20, 1998 and stated that his impression of Claimant was that he suffered from "[s]evere pulmonary disease, both obstructive lung disease and probably coal worker's pneumoconiosis," among other ailments (including a recent stroke). Dr. Gash noted that Claimant suffers from COPD, also noting that "[h]e has a subjective history of coal workers' pneumoconiosis," and that he suffers from daily coughing and wheezing, as well as "chronic rattling of the chest." A smoking history of one-and-one-half packs daily for 47 years and a coal mining history of 37 years were recorded. (DX 22).

b. **Dr. Dumont**, who is Board-certified in surgery, submitted a discharge report chronicling Claimant's stay at HVMC from May 28, 1998 to June 8, 1998. After reviewing Claimant's immediate medical history, discussed by Dr. Gash, which focused on his heart problems, Dr. Dumont noted that Claimant has a past history of "[c]hronic tobacco abuse" and "COPD." Claimant underwent bypass surgery on July 3, 1998 and was discharged five days later. Dr. Dumont's final diagnosis is Claimant suffers from coronary artery disease, chronic tobacco abuse, and COPD. (DX 22).

2. **Dr. Paranthaman**, who is Board-certified in internal medicine and has earned subspecialty certificates in the areas of critical care medicine, geriatric medicine, and pulmonary disease, offered a medical report dated April 19, 2000, in which he diagnosed Claimant with the following: (1) simple CWP; (2) pulmonary emphysema; (3) bronchospasm; and (4) atherosclerotic heart disease, status post coronary artery bypass surgery. Dr. Paranthaman based his findings on a personal examination, which included a chest x-ray, a blood-gas study, a pulmonary function test, and an EKG (all

administered by Dr. Paranthaman), and a work history of thirty-seven years of coal mine employment and a one pack per day smoking history from 1963 to 1998. Dr. Paranthaman stated that Claimant's CWP "is related to coal dust exposure . . . if documented," and attributed his emphysema to a combined effect of Claimant's exposure to coal dust and cigarette smoke. Dr. Paranthaman also stated that Claimant's severe respiratory problems prohibit him from returning to his last job in the coal industry, while his heart disease further aggravates his total disability. (DX 7).

3. **Dr. Fino**, who is Board-certified in internal medicine with a subspecialty in pulmonary disease, submitted a medical opinion dated October 5, 2000 in which he acknowledged that Claimant is totally disabled, but not due to any disease caused by or related to coal dust exposure. Preliminarily, Dr. Fino based his opinions on a forty year coal mine employment history and a fifty-two-pack-year smoking history, as well as a physical examination and comprehensive review of all of Claimant's medical records available at the time. Dr. Fino noted a history of breathing difficulties, primarily a shortness of breath, as well as dyspnea, and also noted that Claimant did not complain of persistent coughing or wheezing. Dr. Fino diagnosed Claimant with "[d]iffuse, severe pulmonary fibrosis not consistent with [CWP]" as well as "obstructive emphysema and bronchitis secondary to cigarette smoking." He explained that the x-ray interpretations do not support a finding of pneumoconiosis and that, while the pulmonary function studies show an "obstructive ventilatory abnormality," the obstruction is located primarily in the small airways, evidenced by the reduced small airway flow when compared to the large airway flow, which is not consistent with "a coal dust related condition." He also notes that while Claimant's fibrosis does cause the obstruction, the fibrosis itself is unrelated to coal dust exposure. Dr. Fino concludes by explaining that, from a respiratory standpoint, Claimant is totally disabled and cannot return to his last coal mine job. However, Claimant's disability is caused by a combined effect from his pulmonary fibrosis and smoking habit. Dr. Fino's final analysis is that none of the pulmonary problems Claimant experiences are related to coal dust exposure and his disability is caused by impairments related to his fibrosis and smoking history. (DX 24).

   Dr. Fino supplemented his medical opinion through deposition testimony, taken on November 2, 2001, where he reasserted his opinion that Claimant suffered from a totally disabling respiratory impairment, but it did not arise out of his coal mine employment or exposure to coal dust. (***See*** EX 11, at 12). Dr. Fino explained that he diagnosed Claimant with "a diffuse pulmonary fibrosis that arose after he left the mines and was not consistent with [CWP]" as well as "an obstructive emphysema and chronic bronchitis due to smoking. . . ." Dr. Fino acknowledged that an extended smoking history as well as long-term coal dust exposure could cause lung dysfunction, but that the opacities he observed in Claimant's lungs were not consistent in size,

shape, and location with those typically found in individuals suffering from coal mine dust-related fibrosis. (EX 11, at 14-17, 23; ***see also*** EX 11, at 44-45).

The pulmonary function studies revealed to Dr. Fino that Claimant suffered from a severe, partially reversible obstructive ventilatory impairment with a "mild" restriction. (EX 11, at 19-20). The blood gas tests Dr. Fino administered produced "normal" results, although none of the results were recorded after exercise was administered. However, Dr. Fino did review Dr. Rasmussen's results, stating that the readings taken after exercise was administered show evidence of "some hypoxemia" due to the reduced diffusing capacity. (EX 11, at 20-21). When all of Claimant's blood-gas test results are viewed together, they fluctuate greatly over time and do not "suggest a permanent abnormality" to Dr. Fino. (EX 11, at 21). However, Dr. Fino did state that Dr. Rasmussen's study is consistent with his own findings, ***i.e.*** Claimant suffers from an obstructive abnormality. (***See*** EX 11, at 21-22). Dr. Fino did, however, disagree with Dr. Rasmussen's opinion that this defect is due to coal dust exposure, explaining that the x-ray evidence does not support such a finding. (EX 11, at 22). Dr. Fino further testified that while pneumoconiosis can be progressive or latent, Claimant's impairments manifested themselves well after he left the mining industry and during a period that he continued to engage in his smoking habit. (***Id.***). He concluded by stating that when all of the clinical data is interpreted together, it is his opinion that none of the totally disabling impairments present in Claimant are due to coal dust exposure. (EX 11).

4. The record also contains a medical opinion from **Dr. Rasmussen**, dated January 19, 2001. Dr. Rasmussen, who is Board-certified in internal medicine, based his opinions on a personal examination, including the above-discussed tests that he personally administered, Dr. Patel's x-ray interpretation, a smoking history of approximately fifty-two-pack-years and a work history of approximately thirty-seven and one-half years. Dr. Rasmussen noted no outward signs of respiratory distress, such as wheezing and rales, but stated that Claimant's pulmonary study results reveal evidence of a "severe, partially reversible obstructive insufficiency." When Claimant underwent exercise in connection with his blood-gas study, he was in "obvious respiratory distress." "[M]oderate resting hypoxemia" was also observed. The blood-gas test and pulmonary function study results reveal a "very severe, totally disabling respiratory insufficiency." Dr. Rasmussen concludes that Claimant is unable to perform his last regular coal mine job. He further concludes that "[Claimant's] extensive x-ray abnormalities [are] consistent with pneumoconiosis" and that "[i]t is medically reasonable to conclude that the patient has [CWP] which arose from his coal mine employment." Finally, Dr. Rasmussen acknowledges that both Claimant's cigarette smoking and coal dust exposure contribute to his respiratory deficiency, but the latter "is a major contributing factor to his disabling lung disease." (CX 1).

Other Medical Evidence: CT Scans. The record also contains a number of interpretations of CT scans. Dr. John Siner offered an interpretation of a CT scan taken on May 29, 1998, in which he observed "evidence of centre lobular emphysema throughout both lungs" and concluded by stating that the CT scan revealed "[a]dvanced emphysematous changes in both lungs." (DX 22). Dr. Templeton also reviewed CT scans, taken on May 30, 1998 at HVMC and at Buchanan General Hospital on September 6, 2000. Dr. Templeton stated that both showed evidence of severe emphysema, as well of enlarged pulmonary arteries, suggesting that Claimant suffers from cor pulmonale as well. (EX 1). Dr. Wheeler also interpreted the same CT scans Dr. Templeton reviewed. Dr. Wheeler stated that the September 6, 2000 CT scan revealed "moderate COPD with areas of decreased and distorted lung marking and [small] scattered bullous blebs in both lungs," but "[n]o evidence of silicosis or CWP." The May 30, 1998 CT scan did not show evidence of pneumoconiosis, but did reveal moderate COPD. (EX 3). Dr. Scott determined that the same two CT scans showed evidence of "[m]oderate bullous emphysema," but "[n]o evidence of silicosis/CWP." (EX 5). Finally, Dr. Wiot, who only reviewed the September 6, 2000 CT scan, submitted an opinion consistent with the other doctors, stating that it confirmed "the severity of COPD" in Claimant, but did not show any evidence of CWP. (EX 7).

Other Medical Evidence Previously Unconsidered. During the course of the previous claim for benefits, Claimant filed a motion to enlarge the record so that certain medical evidence previously not considered would be made part of the record. (DX 27-70). However, this request was denied by the BRB and, thus, the medical evidence has never been considered. (***See*** DX 27-71). The following is a brief summary of the evidence.

DX 27-70, which contains this evidence, includes the following:

1. A medical opinion from Dr. G. S. Kanwal, dated June 28, 1989, diagnosing Claimant with COPD, "coal dust exposure with pneumoconiosis," and acid peptic disease. Dr. Kanwal also noted that Claimant was "totally and permanently disabled due to his lung condition and [unable] to engage in gainful activity."

2. An x-ray interpretation made by Dr. N. Eryilmaz in September 1985, which contains the following observations: "There is mild degree arteriosclerosis of the thoracic aorta. There are p and s type opacities in both lungs with a profusion 1/1 secondary to pneumoconiosis. The lungs show moderate degree of emphysema. No large opacities are seen." A diagnosis of pneumoconiosis followed.

3. Dr. Eryilmaz also interpreted a chest x-ray taken on November 14, 1988 and noted that both interstitial types of pulmonary fibrosis and emphysema were present. He then stated that "[t]he findings have not changed since 1987, no pneumonia."

4. The following arterial blood-gas tests: May 27, 1986 (qualifying), September 8, 1986 (non-qualifying), February 29, 1987 (non-qualifying), and April 21, 1988 (qualifying). All were administered by Dr. Kanwal, who listed "hypoxemia" as an interpretation each time.

Finally, ALJ Gray summarized the medical evidence he considered on pages four to nine in his initial decision and order denying benefits (DX 27-60), all of which are contained in DX 27.

Discussion and Analysis

Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis. 20 C.F.R. § 718.1(a) (2001). "Pneumoconiosis," commonly known as "black lung disease," is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." ***Id.***. § 718.201(a). In addition to establishing the existence of pneumoconiosis, a successful claimant must prove that (1) the pneumoconiosis arose out of coal mine employment; (2) he or she is totally disabled, as defined in section 718.204; and (3) the total disability is due to pneumoconiosis. ***Id.*** §§ 718.202 to 718.204.

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267 (1994), the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

Finally, as noted earlier, the instant case is a refiled claim, as the last prior claim was finally denied by the BRB on July 29, 1992, more than one year before the instant claim was filed (on April 4, 2000). Such a claim should be denied based upon the prior denial unless the claimant can establish a material change in conditions. ***See*** 20 C.F.R. § 725.309(d) (1999).[10] Accordingly, the general rule is to require that the administrative law judge make a threshold determination as to whether the evidence submitted since the final denial is sufficient to establish a material change in conditions pursuant to 20 C.F.R. § 725.309. If it is, the merits of the claim should be considered. If it is not, the claim must be denied.

This case arises under the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit, as Claimant's usual and last coal mine employment took place in Virginia. The standard for

[10] Several of the regulations governing the Act were recently amended; the amendments are found at 65 Fed. Reg. 79,920 (Dec. 20, 2000) and are codified at 20 C.F.R. Parts 718, 722, 725-27. However, under 20 C.F.R.§ 725.2 (2001), the 1999 version of specified sections, including section 725.309, is to be applied to claims pending on January 19, 2001. Thus, the 1999 version of this section is applicable to the instant claim.

finding a "material change in conditions" is governed by the Fourth Circuit's holding in ***Lisa Lee Mines v. Director, OWCP***, 86 F.3d 1358 (4th Cir. 1996) (***en banc***). In ***Lisa Lee Mines***, the Fourth Circuit adopted the standard suggested by the Director, "which requires the claimant to prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." ***Id.*** at 1362.

For the purposes of the refiled claim, only the evidence based on medical tests generated after Judge Gray's initial denial of January 28, 1988 will be considered, as it would be counter-intuitive to allow Claimant to demonstrate that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final based on medical records reflecting his physical condition prior to that determination. ***See id.*** However, if Claimant successfully proves that his condition has changed, all the medical evidence of record, irrespective of the date that the underlying medical data was generated, will be considered.

The last prior claim was finally denied on the grounds that Claimant did not prove the following elements: (1) that he suffered from pneumoconiosis and (2) that he was totally disabled. (DX 27-60, 27-84). Thus, to establish a material change in conditions, the Claimant must now establish that he suffers from the disease or that he is totally disabled.

Material Change: Total Disability

As will be shown below, Claimant has successfully proven that he is totally disabled and, as such, has proved an element of entitlement previously adjudicated against him. To prevail on a claim for black lung benefits, a claimant must prove, ***inter alia***, that he or she is totally disabled.[11] 20 C.F.R. § 718.204(a) (1999); ***Tolver v. Eastern Associated Coal Co.***, 43 F.3d 109, 112 (4th Cir. 1995). The regulations set forth several ways a claimant can prove this element of entitlement, such as submission of certain medical evidences establishing total disability, or by taking advantage of certain rebuttable and irrebuttable presumptions if they are available to the miner.[12] ***See*** 20 C.F.R. § 718.204(b)(1)-(2) (2001). After establishing that he or she is totally disabled, the claimant must then prove total disability due to pneumoconiosis. 20 C.F.R. §

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[11] The constitutionality of several of the recent amendments to the regulations was recently challenged, with many being upheld by the U.S. Court of Appeals for the District of Columbia. ***Nat'l Mining Assoc. v. Dep't of Labor***, __ F.3d __, 2002 WL 1300007 (D.C. Cir. 2002). However, the court did find that 20 C.F.R. § 718.204(a) (the "total disability rule"), as amended, was "impermissibly retroactive" as applied to cases pending at the time the action was filed (which encompasses this claim), and that "the state of the law on this question exactly as it was prior to the regulations promulgation" should be applied to such cases. While the Fourth Circuit's approach on this issue is essentially the same as that codified in the revised section 718.204(a), the 1999 version will be referenced to comport with the D.C. Circuit's holding. The D.C. Circuit's ruling is limited to subsection (a) only.

[12] None of the presumptions contained in 20 C.F.R. §§ 718.304 to 718.306 are available to Claimant.

718.204(a) (1999). The finder of fact must not take into account any non-pulmonary or non-respiratory impairments a claimant may have when making this determination, unless said condition causes a chronic respiratory or pulmonary impairment. ***Id.***; ***Tolver***, 43 F.3d at 112. Finally, in meeting this last requirement, a claimant must show that "pneumoconiosis . . . is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. § 718.204(c)(1) (2001); ***see also Jewell Smokeless Coal Corp. v. Street***, 42 F.3d 241 (4th Cir. 1994) (establishing that pneumoconiosis need not be the sole cause of a claimant's total disability, but rather pneumoconiosis need only be a "contributing cause" to any totally disabling respiratory or pulmonary condition); ***Scott v. Mason Coal Co.***, 14 B.L.R. 1-37 (BRB 1990) (***en banc***).

Claimant has successfully proven that he is now totally disabled and, thus, has established a material change in conditions on an element previously decided against him. The regulations provide that total disability may be established by pulmonary function tests, arterial blood gases, evidence of cor pulmonale with right-sided congestive heart failure, and reasoned medical opinions. ***See*** 20 C.F.R. § 718.204(b)(2) (2001). Claimant has submitted three pulmonary function tests in support of his refiled claim. All three tests produced qualifying results and, as such, Claimant has successfully proved by a preponderance of the evidence that he is totally disabled solely by the pulmonary function test results. ***See*** 20 C.F.R. § 718.204(b)(2)(i) (2001). However, Claimant has not proved total disability under sections 718.204(b)(2)(ii)-(iii). Claimant has submitted results from four arterial blood-gas tests recorded after the previous claim was denied, with two producing qualifying results. However, this evidence is in equipoise and he has not established by a preponderance of the evidence that he is totally disabled based solely on the blood-gas test results. Additionally, two physicians (Drs. Templeton and Paranthaman) suggest that Claimant suffers from cor pulmonale. (DX 9; EX 1). However, neither affirmatively states that Claimant suffers from cor pulmonale with right-sided congestive heart failure, as the regulations require, and, thus, he cannot rely on section 718.204(b)(2)(iii) to support proof of disability. Claimant has, though, submitted a number of new medical opinions, as discussed above, and among the physicians who address this issue, all universally agree that Claimant is totally disabled due to his severe respiratory problems and unable to return to or perform his last coal mine job.[13] (***See*** DX 7, DX 24; CX 1). Thus, Claimant has established by a preponderance of the evidence that he is totally disabled solely by the medical opinion evidence submitted in support of his claim under section 718.203(b)(2)(iv).

After all of the evidence under each subsection addressing this element of entitlement is evaluated together, I find that Claimant has successfully proved by a preponderance of the evidence that he is totally disabled due to a respiratory impairment and unable to perform his last coal mine job due to this impairment. As such, Claimant has proved one of the elements previously decided against him and has met his burden in establishing a material change in conditions exists. Because Claimant has prevailed on this threshold matter, whether or not a

[13] Neither of the physicians from HVMC, Drs. Gash and Dumont, offers any opinion on the issue of disability. (DX 22).

change in conditions exists on the issue of the existence of the disease is moot and the merits of the claim shall now be addressed.

Preliminarily, in evaluating the merits of this claim, I will give greater weight to the more recent medical evidence rather than the reports and opinions submitted as part of the original claim, the latter of which are based on medical data that is at least fifteen years old. The Fourth Circuit has held that it is appropriate for the finder of fact to afford the more recent evidence greater weight given the progressive nature of the disease, although an ALJ may not do so "mechanically or arbitrarily." ***Eastern Associated Coal Corp. v. Director, OWCP***, 220 F.3d 250, 258-59 (4th Cir. 2000) (citing ***Lane Hollow Coal Co. v. Director, OWCP***, 137 F.3d 799 (4th Cir. 1998); ***Adkins v. Director, OWCP***, 958 F.2d 49, 51-52 (4th Cir.1992)). I find that the more recent medical evidence is more probative of Claimant's current medical condition and, thus, I will afford it more weight, although all the evidence in the record will be considered.

Existence of Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis (applicable to claims filed after January 1, 1982): (1) a chest x-ray meeting criteria set forth in 20 C.F.R. § 718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. § 718.304 (or two inapplicable presumptions set forth in § 718.305 and § 718.306); or (4) a determination of the existence of pneumoconiosis as defined in § 718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(1)-(4) (2001). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests or procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. The definition of pneumoconiosis in § 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease.

The regulations define legal pneumoconiosis as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic respiratory or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2) (2001) (emphasis added). The section continues by stating that "'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." ***Id.*** at § 718.201(b) (emphasis added). Thus, a claimant miner who cannot prove clinical pneumoconiosis may be able to show that he or she suffers from legal pneumoconiosis by showing that his or her lung condition was substantially aggravated by coal mine employment.

X-ray Interpretations. Claimant has not established by a preponderance of the evidence that he suffers from pneumoconiosis based on the x-ray evidence alone. The record contains eighteen "new" x-ray interpretations and, among this evidence, two-thirds of the physicians found no evidence of abnormalities consistent with pneumoconiosis. The remaining six interpretations were read as positive, with opacities detected ranging in profusion from 1/0 to 2/2. However, Drs. Paranthaman and Gaziano, who offer positive interpretations of 1/1 and 2/2, respectively, are B-readers, but not BCRs. Drs. Wheeler and Wiot, who both possess superior credentials being that they are B-readers as well as BCRs, found no evidence of pneumoconiosis after interpreting the same x-ray (dated April 19, 2000). (***Compare*** EX 9, 10 ***with*** DX 9, 10). Further, while there is a split among the physicians regarding the interpretation of Claimant's September 9, 2000 x-ray, Dr. Templeton's positive interpretation is outweighed by the interpretations of Drs. Wheeler and Scott. Finally, while Dr. Patel's interpretation is the most recent, I am reluctant to attach greater weight to this interpretation given that there is only a five month gap separating this x-ray from the previous one. ***See Stanley v. Director, OWCP***, 7 B.L.R. 1-386 (1984); ***Tokarcik v. Consolidation Coal Co.***, 6 B.L.R. 1-666 (1983).

Regarding the older x-ray interpretations, Judge Gray found them to be insufficient to support a finding of pneumoconiosis, a determination I agree with and adopt after independently reviewing these records. While not discussed independently, I have evaluated and considered Dr. Eryilmaz's two positive interpretations and find that, while they are positive for a finding of pneumoconiosis, they are outweighed by the other negative interpretations. As such, Claimant has failed to meet his burden of proof, as a majority of the x-ray interpretations offered fail to diagnose Claimant with pneumoconiosis. The x-ray interpretations are, at best, in equipoise and, as a result, Claimant fails to meet his burden of proof regarding this element based on the x-ray interpretations alone.

Biopsy or Autopsy and Presumptions. There is no pathological evidence of record and none of the presumptions set forth in sections 718.304 to 718.306 are applicable. As a result, Claimant cannot rely on 20 C.F.R. § 718.202(a)(2)-(3) to prove the existence of pneumoconiosis.

Medical Opinions. Based on the medical opinions alone, Claimant has failed to meet his burden of proof on this issue. Preliminarily, little weight will be give to Dr. Gash's and Dr. Dumont's opinions. While Dr. Gash states that Claimant suffers from COPD, he has not associated the COPD with coal dust exposure, and although he lists Claimant's "subjective history of [CWP]" and states that Claimant "probably has [CWP]," he has articulated no clinical or other basis for his diagnosis, apart from the history. (DX 22). Such an opinion is too equivocal to carry much weight on its own and not very probative on this particular issue. ***See U.S. Steel Mining Co., Inc. v. Director, OWCP***, 187 F.3d 384 (4th Cir. 1999); ***Burek v. Valley Camp Coal Co.***, 12 Fed. Appx. 152, 2001 WL 687586 (4th Cir. June 18, 2001) (unpublished). Likewise, Dr. Dumont's opinion is afforded little probative weight, as he does not support his diagnosis of "chronic obstructive pulmonary disease" with any explanation as to how he arrived at this determination, which is also apparently based upon a history, and he has not commented upon the etiology of the COPD. (DX 22). As such, neither physician offers a "reasoned" medical opinion

establishing the existence of pneumoconiosis and their opinions are entitled to little weight on this issue. 20 C.F.R. § 718.202(a)(4) (2001); ***see Clark v. Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (BRB 1989) (***en banc***); ***Fields v. Island Creek Coal Co.***, 10 B.L.R. 1-19 (BRB 1987).

Turning to the remaining recent medical opinions, Drs. Paranthaman and Rasmussen both offer opinions that, on their face, best support Claimant's contention that he suffers from pneumoconiosis. Dr. Paranthaman offers a terse diagnosis of simple CWP and attributes the cause of this disease to Claimant's coal dust exposure. (DX 7). Similarly, Dr. Rasmussen, who offered a well-reasoned opinion, diagnoses Claimant with "[CWP] which arose from his coal mine employment." (DX 1). However, Drs. Paranthaman and Rasmussen based their opinions on a review of only a small portion of the medical evidence, and, as such, their opinions may be entitled to lesser weight. ***See*** 20 C.F.R. § 718.202(a)(4) (2001); ***Smith v. Jewell Smokeless Coal Corp.***, 9 Fed. Appx. 140, 2001 WL 513402 (4th Cir. May 15, 2001); ***Church v. Eastern Associated Coal Corp.***, 20 B.L.R. 1-8 (BRB 1996); ***see generally Sabett v. Director, OWCP***, 7 B.L.R. 1-299 (BRB 1984).

Dr. Rasmussen's opinion is also entitled to less weight because it is expressed in somewhat equivocal terms. Instead of diagnosing CWP based upon reasonable medical certainty, he opined that it is "reasonable to conclude" that Claimant has CWP.

Further, in addition to not offering an opinion based on a comprehensive review of Claimant's medical data, Dr. Paranthaman provides a very conclusory opinion, as he does not explain in detail how the medical evidence he does rely upon supports his diagnosis. In fact, despite detailed clinical findings, Dr. Paranthaman provides no explanation as to how he arrived at his conclusions and merely lists simple CWP as a diagnosis. Dr. Paranthaman's opinion is therefore entitled to little weight on this issue. 20 C.F.R. § 718.202(a)(4) (2001); ***see Clark v. Karst-Robbins***, ***supra***; ***Fields v. Island Creek Coal Co.***, ***supra***.

By contrast, Dr. Fino, who offers a very well-reasoned and well-documented medical opinion unequivocally concluding that Claimant did not suffer from CWP, reviewed a much greater array of medical data than Drs. Rasmussen and Paranthaman. (***See*** DX 24; EX 11). While Dr. Fino does not find any evidence supporting a diagnosis of simple CWP, he does acknowledge that Claimant suffers from a number of other respiratory impairments, such as fibrosis, emphysema and bronchitis. However, Dr. Fino offers an opinion that Claimant's smoking history rather than his coal dust exposure is the primary cause of these ailments, as the clinical test results themselves do not reveal any abnormalities that are consistent with a coal dust-related condition. (DX 24). At the deposition, Dr. Fino explained that the shape, size, and location of the opacities detected in Claimant's lungs were not consistent with those typically found in individuals suffering from a disease caused by exposure to coal dust. (EX 11, at 14-17, 23). Thus, Dr. Fino's final conclusion is that Claimant does not suffer from CWP and, further, none of the medical data he reviewed supports a diagnosis that any of Claimant's respiratory impairments arose out of his coal mine employment and related coal dust exposure.

Dr. Fino's opinion outweighs the other newly submitted opinions. As discussed above, the opinions of Drs. Gash and Dumont carry very little weight, as neither doctor offers a well-documented, well-reasoned medical opinion diagnosing Claimant with pneumoconiosis. Further, the opinions submitted by Drs. Paranthaman and Rasmussen are outweighed by Dr. Fino's opinion, largely due to Dr. Fino's comprehensive review and analysis of Claimant's clinical data. While Drs. Paranthaman's and Rasmussen's failure to comprehensibly review the older medical data may be overlooked, as I explained above that this data is too remote to provide an accurate assessment of Claimant's current state of health, the two doctors only considered a very small percentage of the more recent test results and x-rays. Such a limited review of Claimant's medical data significantly undermines their final conclusions. In particular, neither doctor considers any of the x-ray interpretations that are negative for pneumoconiosis, or any of the CT scan interpretations. Furthermore, putting aside the limited amount of medical data relied upon, Dr. Paranthaman does not explain how the medical data he reviewed supports his diagnosis and, as explained above, his opinion is not "well-reasoned" and fails to carry much weight for this reason too.

After reviewing all of the new medical opinions submitted in connection with this claim, I find that they do not prove by a preponderance of the evidence that Claimant suffers from either medical or legal pneumoconiosis. While Dr. Paranthaman offers a diagnosis of "medical pneumoconiosis," as defined in section 718.201(a), his opinion is conclusory in nature. (DX 7). Further, Dr. Rasmussen does not provide a definitive diagnosis of CWP, stating that the x-ray results he reviewed are "consistent" with the disease and that it is "medically reasonable to conclude" that Claimant suffers from CWP. (CX 3). Dr. Fino's opinion is much more definite and persuasive, as he clearly explains at the deposition why Claimant's test results do not support a diagnosis of CWP, and Dr. Fino's analysis is basically unrefuted. I therefore give his opinion additional weight.

Regarding the existence of legal pneumoconiosis, Dr. Fino fully explains his conclusion that the respiratory impairments he detected were not "significantly related to, or substantially aggravated by" coal dust exposure, supporting his determination with specific references to Claimant's medical tests and x-rays. (***See*** DX 24; EX 11). Neither Dr. Paranthaman nor Dr. Rasmussen offers a diagnosis of legal pneumoconiosis comporting with the regulations. Dr. Paranthaman states that the emphysema he detects is caused by the combined effects of Claimant's cigarette smoking and coal dust exposure. (DX 7). However, he has not quantified the degree of contribution by either factor, thereby making his opinion difficult to analyze under section 718.201(b), which requires that the disease or impairment be "significantly related to or substantially aggravated by" occupational coal mine dust exposure. Further, while Dr. Rasmussen offers a diagnosis that comes closer to meeting the regulations' definition, stating that dust exposure is a "major contributing factor," he, again, fails to explain in what way it contributed to the Claimant's disabling lung disease or how he arrived at this conclusion. (CX 1). After evaluating the newer medical opinions on this issue, I find that Dr. Fino's more comprehensive and detailed report and deposition testimony carries the greatest amount of weight.

After reviewing all of the older medical opinions of record, including Dr. Kanwal's previously unconsidered medical opinion of June 28, 1989, I agree with Judge Gray's determination that they fail to establish that Claimant suffers from pneumoconiosis, as most of these opinions attribute the cause of any respiratory or pulmonary defects to tobacco smoke exposure, or they fail to address the etiology issue altogether. (***See*** DX 27-22, 27-35, 27-36, 27-46, 27-47, 27-48, 27-50, 27-51 (older medical opinion evidence)). When all of the medical opinion evidence is reviewed together, Claimant has failed to prove the existence of the disease by a preponderance of the evidence and, thus, fails to meet his burden of proof under section 718.202(a)(4).

Other Medical Evidence: CT Scans. The regulations make no specific reference to computerized tomography ("CT") scans and do not indicate whether it should be considered x-ray evidence or medical opinion evidence. However, this evidence has been found to qualify for the purpose of diagnosing "complicated pneumoconiosis" based upon "other evidence" as described in section 718.304(c). ***Melnick v. Consolidation Coal Co.***, 16 B.L.R. 1-31 (1991) (***en banc***). Additionally, the U.S. Court of Appeals for the Seventh Circuit recently held that CT scan interpretations, taken alone, are entitled to no special deference, and should merely be evaluated along side all of the other medical evidence in the record. ***Consolidation Coal Co. v. Director, OWCP***, __ F.3d __, 2002 WL 1363785 (7th Cir. 2002). As discussed above, there are a number of CT scan interpretations in the record, with none of the physicians offering opinions diagnosing Claimant with CWP, silicosis, or any other disease recognized as "clinical pneumoconiosis" as defined by 20 C.F.R. § 718.201(a)(1). Further, while the CT scans reveal a number of respiratory problems, none of the physicians state that any of the diseases they detect were "significantly related to, or substantially aggravated by," Claimant's exposure to coal dust and, thus, no doctor has offered a diagnosis of "legal pneumoconiosis" either. ***See*** 20 C.F.R. § 718.201(a)(2)-(c) (2001). As such, the CT scan interpretations tend to establish that Claimant does not suffer from pneumoconiosis. (DX 7).

After all of the medical evidence in the record is evaluated and weighed together, Claimant has not successfully proved that he suffers from pneumoconiosis, as defined by the regulations. While this is a close case, the evidence is, at best, in equipoise, which would still be insufficient to meet the burden of proof required by ***Greenwich Colleries***, ***supra***. As such, Claimant has failed to establish this essential element of entitlement and he cannot prevail.

Remaining Issues

Because Claimant has failed to prove that he suffers from pneumoconiosis, a separate discussion and analysis of the remaining issues raised by this claim is moot, as Claimant cannot prevail even if the remaining elements were all resolved in his favor.[14]

ORDER

IT IS HEREBY ORDERED that the claim of Curtis H. Hess be, and hereby is, **DENIED**.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.

[14] Assuming ***arguendo*** that Claimant does suffer from the disease, his claim would still fail on the basis that he has not successfully shown that he is totally disabled due to pneumoconiosis. As discussed above with respect to legal pneumoconiosis, there is a lack of competent medical evidence quantifying any contribution by coal mine dust to the Claimant's respiratory or pulmonary disability.